

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
JOE POTTER)	
)	
)	
RESPONDENT)	CASE NO. WPC08-0117

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "Division") by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Department").

II.

Joe Potter (hereinafter the "Respondent") is the owner/developer of property located at 3645 West Lamar Alexander Parkway and Highway 321 in Blount County, Tennessee (hereinafter the "site"). Service of process may be made on the Respondent at PO Box 388, Friendsville, Tennessee, 37737.

JURISDICTION

III.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) § 69-3-101 et seq., the Water Quality Control Act, (hereinafter the "Act") has occurred, or is about to occur, the Commissioner may issue a complaint to the violator, and may order corrective action be taken pursuant to T.C.A. § 69-3-109(a) of the Act. Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act; and has authority to assess damages incurred by the State resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. § 69-3-105 and are effective as the Official Compilation Rules and Regulations of the State of Tennessee, Chapters 1200-4-3 and 1200-4-4 (hereinafter the "Rule"). Pursuant to T.C.A. § 69-3-107(13), the Commissioner may delegate to the Director of the Division of Water Pollution Control any of the powers, duties, and responsibilities of the Commissioner under the Act.

IV.

The Respondent is a "person" as defined at T.C.A. § 69-3-103(20) and, as herein described, has violated the Act.

V.

Tennessee Code Annotated § 69-3-108 requires a person to obtain coverage under a permit from the Department prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the Tennessee Construction General Permit (TNCGP) for storm water discharges associated with construction activity may be obtained by submittal of a Notice of Intent (NOI), a Storm Water Pollution Prevention Plan (SWPPP), and an appropriate fee.

VI.

Pursuant to Tennessee Code Annotated § 69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a § 401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

VII.

The unnamed tributary to Floyd Creek, referred to herein, is “waters of the state” as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state are classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, “Use Classifications for Surface Waters,” is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly,

these waters are classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife.

FACTS

VIII.

Only July 25, 2007, a NOI, SWPPP, and appropriate fee were submitted to the Knoxville Field Office (KEFO) by the Respondent, requesting coverage under the TNCGP for construction activities at the site.

IX.

On August 3, 2007, prior to issuing coverage to the Respondent, division personnel from the KEFO conducted a site inspection and observed that several acres of land had been disturbed and cleared of vegetation, a dam was being constructed across an unnamed tributary to Floyd Creek, and a road crossing for a driveway had been installed in the same tributary downstream of the dam.

X.

Division personnel issued the Respondent a Notice of Violation (NOV) on August 7, 2007, as a result of the violations observed during the aforementioned inspection. In the NOV, the Respondent was cited for failing to obtain permit coverage prior to engaging in land disturbance activities, and was to obtain coverage under the TNCGP by submitting a completed NOI, SWPPP, and appropriate fee. The Respondent was also informed that

authorization under an ARAP was required prior to performing any alteration to waters of the state.

XI.

On August 8, 2007, the division issued coverage under the TNCGP to the Respondent for construction activities at the site and assigned the coverage tracking number TNR132727.

XII.

On April 4, 2008, division personnel conducted a site investigation and it was observed that erosion prevention and sediment control (EPSC) measures installed at the site were inadequate and had not been properly maintained, allowing sediment to migrate from the site and collect in the tributary.

XIII.

On April 8, 2008, division personnel issued a 2nd NOV as a result of the April 4, 2008, inspection. The Respondent was cited for failure to comply with the requirement of the TNCGP and for causing a condition of pollution.

The Respondent was instructed to ensure that EPSC measures were properly installed and then maintained, and then inspected at least twice a week. The Respondent was further instructed to contact the KEFO to schedule a compliance review meeting due to the Respondent's activities having caused a condition of pollution.

XIV.

During the course of investigating this case, the Division has incurred damages in the amount of FOUR HUNDRED NINETY-FOUR DOLLARS AND SEVENTY-FOUR CENTS (\$494.74).

VIOLATIONS

XV.

By performing construction activities without coverage under the TNCGP, the Respondent has violated T.C.A. §§ 69-3-108(a)(b), and 114(b), which state in part:

§ 69-3-108(a) states, in part:

Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

§ 69-3-108(b) states, in part:

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological,

- biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

§ 69-3-114(b) states, in part:

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XVI.

By causing a condition of pollution in the unnamed tributary to Floyd Creek, the Respondent has violated T.C.A. § 69-3-114(a).

§ 69-3-114(a) states, in part:

It is unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in Section 69-3-103 (22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondent:

1. The Respondent shall implement appropriate EPSC measures designed by a professional engineer or landscape architect to assure that no eroded material leaves the site and enters waters of the state. Documentation that EPSC measures have been implemented is to be sent within 15 days of receipt of this Order to the manager of the Division of Water Pollution Control located at the Knoxville Environmental Field Office, located at 3711 Middlebrook Pike, Knoxville, Tennessee 37921.
2. The Respondent shall maintain appropriate EPSC measures to assure that no additional material leaves the site and enters waters of the state. The EPSC measures shall be maintained until permanent erosion preventive vegetative cover is established.
3. Within 30 days of receipt of this Order the Respondent shall submit a corrective action plan (CAP), designed by a professional engineer or other qualified professional, to restore the affected stream segment, specifically addressing the removal of sediment and the stabilization of the affected area. This plan shall, at a minimum, include detailed options for removing the sediment deposits, where appropriate, and a time schedule to identify the proposed activities and the dates

required to complete the work. The CAP is to be submitted to the manager of the Division of Water Pollution Control located at the KEFO at the address listed in Item 1, above.

4. The Respondent shall, within 60 days of written approval of the restoration plan, complete implementation of the plan and send documentation of completion to the manager of the Division of Water Pollution Control located at the KEFO at the address listed in Item 1, above.
5. The Respondent shall, within 6 months of receipt of this Order, provide documentation of attendance and successful completion of the Department's Erosion Prevention and Sediment Control Workshop, for all employees who manage or oversee construction projects. Notification of completion shall be sent to the manager of the Division of Water Pollution Control located at the KEFO, at the address listed in Item 1, above. Information regarding the workshop can be found online at <http://www.tnepsc.org>.
6. The Respondent is hereby assessed DAMAGES in the amount of FOUR HUNDRED NINETY-FOUR DOLLARS AND SEVENTY-FOUR CENTS (\$494.74), payable within 30 days of receipt of this Order.
7. The Respondent shall pay a CIVIL PENALTY of SEVEN THOUSAND DOLLARS (\$7,000.00) to the Department, hereby assessed, to be paid as follows:
 - a. The Respondent shall, within 30 days of receipt of this ORDER, pay a CIVIL PENALTY in the amount of ONE THOUSAND SEVEN HUNDRED FIFTY DOLLARS (\$1,750.00).


- b. If, and only if, the Respondent fails to comply with item 1 above in a timely manner, the Respondent shall pay ONE THOUSAND DOLLARS (\$1,000.00) to the Division within 30 days of default.
- c. If, and only if, the Respondent fails to comply with item 2 above in a timely manner, the Respondent shall pay ONE THOUSAND DOLLARS (\$1,000.00) to the Division within 30 days of default.
- d. If, and only if, the Respondent fails to comply with item 3 above in a timely manner, the Respondent shall pay ONE THOUSAND TWO HUNDRED DOLLARS (\$1,200.00) to the division within 30 days of default.
- e. If, and only if, the Respondent fails to comply with item 4 above in a timely manner, the Respondent shall pay ONE THOUSAND TWO HUNDRED DOLLARS (\$1,200.00) to the Division within 30 days of default.
- f. If, and only if, the Respondent fails to comply with item 5 above in a timely manner, the Respondent shall pay EIGHT HUNDRED FIFTY DOLLARS (\$850.00) to the Division within 30 days of default.

The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director of the Division of Water Pollution Control may, for good cause shown, extend the compliance dates contained within this Order and Assessment. In order to be eligible for this time extension, the Respondent shall submit a written request to be received a minimum of 30 days in advance of the compliance date. The request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension will be in writing.

Further, the Respondent is advised that the foregoing Order and Assessment is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Order and Assessment will be one factor considered in any decision whether to take enforcement action against the Respondent in the future.

Issued by the Director of the Division of Water Pollution Control on this 28th day of May, 2008.

A handwritten signature in blue ink, appearing to read "Paul E. Davis", is written over a horizontal line.

PAUL E. DAVIS, P.E.
Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§ 69-3-109, 115, allow the Respondent to secure review (appeal) of this Order and Assessment. To do so, a written petition setting forth the grounds (reasons) for requesting a hearing before the Water Quality Control Board must be RECEIVED by the Department within THIRTY (30) DAYS of the date the Respondent received this Order and Assessment or it will become final (not subject to review).

Artificial Respondents (corporations, limited partnerships, limited liability companies, etc.) cannot carry-on the practice of law. They may secure review (appeal) before the Water Quality Control Board only through an attorney licensed to practice law in Tennessee. Natural Respondents may represent themselves or be represented by an attorney licensed to practice law in Tennessee. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Any hearing of this case before the Board will be a contested case hearing governed by T.C.A. § 4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. Such hearings are in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses to testify.

At the conclusion of a hearing the Board has the authority to affirm, modify, or deny the Order and Assessment. This includes the authority to modify the penalty within the statutory confines (up to \$10,000.00 per day per violation). Furthermore, the Board has the authority to assess additional damages incurred by the Department including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing

and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Any petition to appeal which is filed should be sent to: Appeal of an Enforcement Order, TDEC-OGC, 20th Floor L & C Tower, 401 Church Street, Nashville, TN 37243-1548. Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Fiscal Services - Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L&C Tower, 401 Church Street, Nashville, Tennessee 37243. All other correspondence shall be sent to Paul E. Davis, Director, Division of Water Pollution Control, Tennessee Department of Environment and Conservation, 6th Floor Annex, 401 Church Street, Nashville, TN 37243. The case number should be written on all correspondence regarding this matter.